SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible]

KINSELLA, WARDEN, APPELLANT,

vs.

UNITED STATES EX REL. SINGLETON

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

FILED [illegible]

PROBABLE JURISDICTION NOTED FEBRUARY [illegible], [illegible]

Supreme Court of the United States

OCTOBER TERM, 1958

No. 571

KINSELLA, WARDEN, APPELLANT,

vs.

UNITED STATES EX REL. SINGLETON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON**

PETITION FOR WRIT OF HABEAS CORPUS

No. 2145

ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

RELEVANT DOCKET ENTRIES

1958

August 12—Order filing Petition for Writ of Habeas Corpus, etc.

August 12—Filed Petition for Writ of Habeas Corpus.

August 12—Issued Writ of Habeas Corpus and 2 copies.

August 12—Order on pauper affidavit, permitting Petitioner to prosecute proceeding to conclusion without prepayment fees.

August 15—Filed Marshal's return on Writ of Habeas Corpus.

August 26—Filed Return and Answer of Respondent and Exhibits A, B, and C, therewith.

Sept. 6—Filed Court's Opinion.

Sept. 8—Order discharging Joanna S. Dial from the custody of Nine Kinsella, Warden of the Federal Reformatory for Women, Alderson, W. Va.

Sept. 8—To certified copy of Order to U. S. Marshal.

Sept. 8—Filed Marshal's return on Order discharging Joanna S. Dial from the custody of Nina Kinsella, Warden of the Federal Reformatory for Women, Alderson, W. Va.

Oct. 8—Filed Notice of Appeal to the Supreme Court of the United States with Proof of Service thereon.

Oct. 15—Filed Cross Designation of Contents of Record on Appeal.

Nov. 17—To preparing and certifying record on appeal.

* * * * *

[fol. 2] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

No. 2145

ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—Filed Aug. 12, 1958

To the Honorable United States District Court for the Southern District of West Virginia.

The petition of Alebrta Singleton respectfully shows:

1. Petitioner, as mother of Mrs. Joanna S. Dial, makes application herein on behalf of Mrs. Joanna S. Dial, for a writ of habeas corpus in that said Mrs. Joanna S. Dial is unlawfully detained and restrained of her liberty by Nina Kinsella, and is now in custody of the said Nina Kinsella, at the Federal Reformatory for Women, Alderson, West Virginia.

2. The cause or pretext of such detention and restraint is a sentence of three (3) years based upon a conviction for involuntary manslaughter in a Court Martial by the 2nd Armored Division, U. S. Army at Bad Kreuznach, Germany, on July 29, 1957, under Article 2 (11) of the Uniform Code of Military Justice. Article 2 (11) of the Uniform Code of Military Justice is based on Article I, Section 8, Clause 14, of the United States *Constitution*, empowering Congress "to make Rules for the Government and Regulation of the Land and Naval Forces."

[fol. 3] 3. Said detention and restraint is unlawful in that Article III, Section 2, of the United States *Constitution* provides that:

"The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

The United States Supreme Court in *Reid* v. *Covert*, 354, U.S. 1, decided June 10, 1957, held that under our Constitution courts of law alone are given power to try civilians for their offenses against the United States. This decision was limited to cases in which the maximum punishment would be death. Mr. Justice Frankfurter in his concurring opinion in this case states that this limitation is only by virtue of the fact that the question in the case involved only a capital punishment case and that lesser offenses were not considered.

Mrs. Joanna S. Dial was a civilian when she was tried and convicted by Court Martial, and, therefore, her conviction and incarceration are in violation of Article III, Section 2, of the *Constitution* granting her the right to trial by jury.

4. Whereas, Mrs. Joanna S. Dial was convicted July 29, 1957, and the conviction was appealed by the Judge Advocates' office and the appellate review is now pending, the last action having been taken September 9, 1957. When she was ordered committed to the Women's Federal Reformatory in Alderson, West Virginia, and whereas, the appellate review cannot be expedited, the determination of the lawfulness by appellate review is inadequate, as said Mrs. Joanna S. Dial has now been detained for a period amounting to one-fourth (1/4) of the sentence imposed. This Writ of Habeas Corpus is the most expedient and adequate remedy for determination of the lawfulness of the detention.

[fol. 4] 5. No other application for this Writ has heretofore been made to any other court or judge.

WHEREFORE, petitioner prays that a Writ of Habeas Corpus issue as herein directed to said Nina Kinsella, commanding her to produce the body of Mrs. Joanna S. Dial before this Court at the time and place to be specified in said Writ, to the end that the Court may inquire

into the cause of Mrs. Joanna S. Dials' detention, and that Mrs. Joanna S. Dial be ordered discharged from the detention and restraint aforesaid.

ALBERTA SINGLETON,
Petitioner.

STATE OF TENNESSEE)
) :
COUNTY OF KNOX)

ALBERTA SINGLETON, a resident of Knox County, Tennessee, having been duly sworn according to law, states that she is the petitioner herein, and that she has read the foregoing petition and knows the contents; that the same are true of her own knowledge, except those things stated upon information and belief, and as to those matters she believes them to be true.

ALBERTA SINGLETON

Sworn to and subscribed before
me this 17th day of April, 1958.

[Seal]

CHAS. N. MILLER
Notary Public

My commission expires: Sept. 18, 1961.

[fol. 5] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Habeas Corpus No. 2145

UNITED STATES OF AMERICA on the relation of ALBERTA SINGLETON, PETITIONER

v.

NINI KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia

RETURN AND ANSWER—Filed Aug. 26, 1958

Comes now the respondent, Nina Kinsella, Warden, United States Federal Reformatory for Women, Alderson, West Virginia, on whom has been served a copy of a writ of habeas corpus for the production of Joanna S. Dial, and by her attorneys makes return and answer to the said writ and respectfully shows to the court that he holds the said Joanna S. Dial by authority of the United States as a prisoner pursuant to the sentence of a general court-martial under the following circumstances:

I

That the said Joanna S. Dial, a dependent wife accompanying the armed forces without the continental limits of the United States within the meaning of Article 2(11) Uniform Code of Military Justice (10 USC802(11)) was duly arraigned in a common trial with her husband, Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton) 35th Army, for the offense of involuntary manslaughter, a non-capital offense, in violation of Article 119 Uniform Code of Military Justice (10USC919) before a general court-martial convened at Bad Kreuznach, Germany, by paragraph 5, Special Orders Number 167, Headquarters 2d Armored Division, APO 42, United States Army, dated 25 July 1957. The said Joanna S. Dial and her husband,

co-accused Specialist Second Class James W. Dial, upon their pleas of guilty, were each found guilty of the offense charged. Prior to her plea of guilty, the trial defense counsel moved to dismiss the charge and specification against Joanna S. Dial on the ground that the court lacked jurisdiction to try a civilian dependent in a foreign [fol. 6] country for a non-capital offense. The law officer denied the motion. The said Joanna S. Dial was sentenced by the court-martial to be confined at hard labor for three years and her husband, Specialist Second Class James W. Dial, was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances and to be confined at hard labor for three years. On 9 September 1957, the convening authority in taking his action upon the case as required by Articles 61 and 64, Uniform Code of Military Justice (10USC861 and 864) approved the sentences in each case (Exhibit A). The record of trial was then forwarded to The Judge Advocate General, Department of the Army, who referred the record of trial to a Board of Review to determine whether the record of trial was legally sufficient to support the findings and sentences as required by Article 66, Uniform Code of Military Justice (10USC 866). The Board of Review found the findings of guilty and the sentences as to each accused correct in law and fact and affirmed them on 14 February 1958. As to her husband, Specialist Second Class Dial, final military appellate review having been completed, his sentence was ordered executed on 25 April 1958, and the Branch United States Disciplinary Barracks, Lompoc, California, was designated as the place of confinement. The Board of Review held that the court-martial had jurisdiction to try Joanna S. Dial, a civilian dependent accompanying the armed forces of the United States without the continental limits of the United States for the non-capital offense of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice (10USC919) (Exhibit B). On 17 March 1958, The Judge Advocate General of the Army forwarded the record of trial of Joanna S. Dial and the decision of the Board of Review to the United States Court of Military Appeals for review pursuant to the provisions of Article 67b(2) (10

USC867b(2)). Under the provisions of this Article, The Judge Advocate General certified to the United States Court of Military Appeals for its consideration and action the following issue:

> Did the court-martial have jurisdiction under Article 2(11) Uniform Code of Military Justice, to try, [fol. 7] for a non-capital offense, the accused, Joanna S. Dial, a person accompanying the armed forces of the United States in Germany in peace time as the dependent wife of the accused Specialist Second Class James W. Dial?

Article 67(d), Uniform Code of Military Justice (10 USC86(d)), provides that the action to be taken by the United States Court of Military Appeals need be taken only with respect to the issues certified by the Judge Advocate General. The Judge Advocate General likewise designated three officers of the Judge Advocate General Corps to represent Joanna S. Dial and three others of the Judge Advocate General Corps to represent the United States before the United States Court of Military Appeals in the review and disposition of her case by that court. Briefs and pleadings pertaining to the jurisdictional issue presently before this court were filed and oral arguments were submitted at a hearing before the United States Court of Military Appeals on 23 June 1958. The case is presently under consideration by that court (Exhibit C). As of the date of the filing of this Return and Answer the United States Court of Military Appeals has not rendered a decision on the jurisdictional issue submitted to it by The Judge Advocate General of the Army.

II

Answering the allegations contained in the petition for writ of habeas corpus, the respondent admits, denies and alleges as follows:

1. Admits the allegation contained in paragraph 1 of the petition except the allegation that the imprisonment and detention is unlawful and specifically denies that such detention or imprisonment is unlawful.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition.

4. Denies the allegations contained in paragraph 4 of the petition and further alleges that the final arguments were submitted at a hearing before the United States Court of Military Appeals, on 23 June 1958, and that the United States Court of Military Appeals is adequately empowered under the provisions of the Uniform Code of Military Justice to grant the relief sought by the petitioner.

[fol. 8] 5. Admits the allegations contained in paragraph 5 of the petition.

III

Further answering the respondent avers:

a. That the prisoner, Joanna S. Dial, was a civilian dependent, accompanying the armed forces of the United States without the continental limits of the United States, both at the time of the offense for which she was tried by the court-martial, and at the time of her trial.

b. That the general court-martial by which the prisoner was tried and convicted for a non-capital offense had jurisdiction over the person of the prisoner and of the non-capital offense charged against her, and that the sentence adjudged against the prisoner by the court-martial was within legal limits and within the power of the court to adjudge.

c. That the prisoner Joanna S. Dial has not exhausted her remedies within the military appellate structure, in that her case has already been fully submitted for decision by the United States Court of Military Appeals on 23 June 1958, and the point now raised before this Honorable Court is being considered by the United States Court of Military Appeals and its decision is expected in the near future.

In obedience, however, to the said writ of habeas corpus the respondent herewith produces before this Honorable Court the body of the said Joanna S. Dial and for the reasons hereinbefore set forth respectfully prays

the court to discharge the said writ, dismiss the petition, and remand Joanna S. Dial to the custody of the respondent.

/s/. DUNCAN W. DOUGHERTY
United States Attorney

/s/ PERCY H. BROWN
Assistant United States Attorney

/s/ LT. COL. PETER S. WONDOLOWSKI
The Judge Advocate General's
Corps, United States Army

[fol. 9] CERTIFICATE OF SERVICE
(Omitted in printing)

• • • •

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

GENERAL COURT-MARTIAL
ORDER NUMBER 35

Before a general court-martial which convened at Bad Kreuznach, Germany, pursuant to paragraph 5, Special Orders Number 167, Headquarters 2d Armored Division, APO 42, US Army, dated 25 July 1957, was arraigned and tried:

Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34, US Army.

Charge: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, did, at Baumholder, Germany, on or about 21 May 1957, by perpetrating offenses directly affecting the person of James W. Dial, Junior, to wit: batteries during a period of several weeks immediately preceding 21 May 1957, unlawfully kill the said James W. Dial, Junior, by striking him upon the head and body with her hands, an electric extension cord, pieces of wood, and a web belt.

PLEAS

To the Charge and Specification: Guilty.

FINDINGS

Of the Specification and Charge: Guilty.

SENTENCE

To be confined at hard labor for three years. (No previous convictions considered.)

The sentence was adjudged on 29 July 1957.

ACTION OF THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

In the foregoing case of Joanna D. Dial, also known as Joanna S. Dial, a person accompanying the Armed Forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, RA 14 233 840, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, 2d Armored Division, the sentence is approved. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, the accused will be confined in the Federal Reformatory for Women, Alderson, West Virginia.

/s/ W. Paul Johnson
/t/ W. PAUL JOHNSON
Major General, USA
Commanding

[fol. 11] GCMO #35, Hq 2d Armd Div, APO 42, US Army, dtd 9 September 57 cont

FOR THE COMMANDER:

W. M. RODGERS
Colonel, GS
Chief of Staff

OFFICIAL:

/s/ Claude E. King
CLAUDE E. KING
CWO, W-2 USA
Asst Adj Gen

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[fol. 12] GENERAL COURT-MARTIAL ORDERS No. 34

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

GENERAL COURT-MARTIAL
ORDER NUMBER 34

Before a general court-martial which convened at Bad Kreuznach, Germany, pursuant to paragraph 5, Special Orders Number 167, Headquarters 2d Armored Division, APO 42, US Army, dated 25 July 1957, was arraigned and tried:

Specialist Second Class James W. Dial, RA 14 233 840, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, APO 34, US Army.

Charge: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, did, at Baumholder, Germany, on or about 21 May 1957, by perpetrating offenses directly affecting the person of James W. Dial, Junior, to wit: batteries during a period of several weeks immediately preceding 21 May 1957, unlawfully kill the said James W. Dial, Junior, by striking him upon the head and body with his hands, an electric extension cord, pieces of wood, and a web belt, and by striking the head of the said James W. Dial, Junior, against a crib headboard.

PLEAS

To the Specification and the Charge: Guilty.

FINDINGS

Of the Specification and Charge: Guilty.

SENTENCE

To be dishonorably discharged from the service, and to forfeit all pay and allowances, and to be confined at hard labor for three years. (No previous convictions considered.)

The sentence was adjudged 29 July 1957.

ACTION OF THE OFFICER EXERCISING COURT-MARTIAL JURISDICTION

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

In the foregoing case of Specialist Second Class James W. Dial, RA 14 233 840, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, 2d Armored Division, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, the accused will be confined in the United States Army Branch Disciplinary Barracks, New Cumberland, Pennsylvania.

s/ W. Paul Johnson
t/ W. PAUL JOHNSON
Major General, USA
Commanding

[fol. 13] GCMO #34, Hq 2d Armd Div, APO 42, US Army, dtd 9 September 57 cont

FOR THE COMMANDER:

W. M. RODGERS
Colonel, GS
Chief of Staff

OFFICIAL:

s/ Claude E. King
CLAUDE E. KING
CWO, W-2 USA
Asst Adj Gen

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[fol. 14] GENERAL COURT-MARTIAL ORDERS No. 129

HEADQUARTERS
BRANCH UNITED STATES DISCIPLINARY BARRACKS
Lompoc, California

25 April 1958

GENERAL COURT-MARTIAL
ORDER NUMBER 129

In the general court-martial case of Specialist Second Class James W. Dial, RA 14 233 840, United States Army, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, APO 34, US Army (presently confined Branch United States Disciplinary Barracks, Lompoc, California), the sentence to dishonorable discharge, forfeiture of all pay and allowances becoming due on and after the date of the action of the convening authority and confinement at hard labor for three years, adjudged 29 July 1957, and as promulgated in General Court-Martial Order Number 34, Headquarters 2d Armored Division, APO 42, US Army, dated 9 September 1957 has been affirmed pursuant to the Uniform Code of Military Justice, Article 66. The provisions of the Uniform Code of Military Justice, Article 71c, having been complied with, the sentence will be duly executed; but the execution of that portion thereof adjudging dishonorable discharge is suspended until the accused's release from confinement. The prisoner will be confined in the Branch United States Disciplinary Barracks, Lompoc, California, and the confinement will be served therein, or elsewhere as competent authority may direct. (CM 397520)

BY ORDER OF COLONEL COX:

H. J. BLAKELY
Captain, AGC
Adjutant

OFFICIAL:

/s/ Ralph Herrod
RALPH HERROD
Lt Col, JAGC
Asst Adjutant

DISTRIBUTION:
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R/N 19662

[fol. 15] DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

In the Board of Review, United States Army

Before

BISANT, SCOTT and BLACKMARR
Members

---

14 February 1958

CM 397520

UNITED STATES

v.

JOANNA S. DIAL, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class JAMES W. DIAL, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34, and Specialist Second Class JAMES W. DIAL, RA 14 233 840, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34

JOANNA S. DIAL, APPELLANT

2D ARMORED DIVISION

Sentences adjudged 29 July 1957

Approved sentences: JOANNA S. DIAL: Confinement at hard labor for three (3) years. Sp2 JAMES W. DIAL: Dishonorable discharge, total forfeitures, and confinement at hard labor for three (3) years.

Appellate Counsel for the Accused:
1st Lt. Lawrence R. Fullem, JAGC

Appellate Counsel for the United States:
1st Lt. William H. Keniry, JAGC

The Judge Advocate General has certified this case to the USCMA for review under UCMJ, Art. 67 (b)(2).

DECISION—Feb. 14, 1958

On 29 July 1957, before a general court-martial convened at Bad Kreuznach, Germany, Specialist Second Class James W. Dial and the appellant, Joanna S. Dial, his wife, pleaded guilty to and were convicted of involuntary manslaughter of James W. Dial, Junior, (a dependent child of the accused), in violation of the Uniform Code of Military Justice, Article 119. At all times Joanna S. Dial was a person accompanying the armed [fol. 16] forces of the United States without the continental limits of the United States (Pros. Ex. 1). The court sentenced the accused, Specialist Dial, to dishonorable discharge, total forfeitures, and confinement at hard labor for three years and the accused, Joanna S. Dial, to confinement at hard labor for three years. The respective sentences were approved by the convening authority who directed that pending completion of appellate review the accused Specialist Dial, be confined in the United States Army Branch Disciplinary Barracks, New Cumberland, Pennsylvania, and that the accused, Joanna Dial, be confined in the Federal Reformatory for Women, Alderson, West Virginia, and forwarded the record of trial to The Judge Advocate General of the Army for review by a board of review. Pursuant to Joanna Dial's request, The Judge Advocate General designated counsel to represent her before the Board of Review. The accused Specialist Dial waived his right to appellate representation.

Appellate defense counsel has assigned the following error:

THE COURT-MARTIAL DID NOT HAVE JURISDICTION OVER THE ACCUSED.

Previous to pleading, the trial defense counsel moved to dismiss the charge and specification on the ground that the court-martial lacked jurisdiction to try Joanna S. Dial on a charge of this nature. The motion was denied (R. 10). Against this background the constitutional question that confronts us is whether the civilian

dependent of an American serviceman may be tried by court-martial in a foreign country for a non-capital offense committed in that country.

Appellant was tried by court-martial which asserted jurisdiction under Article 2(11) of the Code which provides:

> "The following persons are subject to this code:
>
> • • • •
>
> "Subject to the provision of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

[fol. 17] Relevant to a determination whether the trial of the appellant was constitutionally permissible are the following provisions of the Constitution:

Article III § 2 prescribes that:

> • • • •
>
> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

The Fifth Amendment states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

And the Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Integrally involved in our consideration of the foregoing provisions are Article I § 8, clause 14, the "Necessary and Proper Clause," which empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," and clause 18 which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers."

[fol. 18] As the keystone authority in support of his contention that the court-martial did not have jurisdiction over the accused, appellate defense counsel relies upon the recent decision of the United States Supreme Court in the consolidated cases of *Reid* v. *Covert* (701) and *Kinsella* v. *Krueger* (713), 354 U.S. 1, 77 S. Ct. 1222 (1957).[1] Originally the court-martial jurisdiction

[1] Mrs. Clarice Covert, dependent wife of an airman, killed her husband on an airbase in England. She was convicted by a court-martial for murder in violation of Article 118 of the Code. The *Krueger* case arose out of the premeditated murder of Colonel Aubrey D. Smith by his dependent wife, Dorothy K. Smith, on a U. S. Army base in Japan. She was convicted of murder in violation of Article 118 of the Code and sentenced to life imprisonment. The findings and sentences were approved by the convening authority and subsequently affirmed by a board of review (10 CMR 350, 13 CMR 307) and the United States Court of Military Appeals (5 USCMA 314).

was upheld by the United States Supreme Court in the cases of *Kinsella* v. *Krueger*, 351 U.S. 470, and *Reid* v. *Covert*, 351 U.S. 487. Subsequently, however, the Court granted a petition for rehearing (352 U.S. 901), and, after further argument and reconsideration held that in capital cases the exercise in time of peace of court-martial jurisdiction over civilian dependents could not be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments. Implicit in Mr. Justice Black's opinion (in which The Chief Justice, Mr. Justice Douglas, and Mr. Justice Brennan join in holding that Article 2(11), supra, is unconstitutional) is the rationale that the constitutional provisions apply everywhere the Government of the United States acts with respect to its citizens; that the power conferred upon Congress by Article I § 8, clause 14, as supplemented by the "Necessary and Proper Clause" does not authorize the making of civilians amenable to court-martial jurisdiction; and Article 2(11) denying civilians trial by jury overseas is therefore violative of Article III and the Fifth and Sixth Amendments.

A crucial aspect of the latest decisions in the *Covert* and *Krueger* cases is the narrow delineation of the issue on which the opinions of the majority actually converge in striking down the court-martial jurisdiction, viz., the validity of the trial by courts-martial of civilian dependents in a capital case in time of peace. Four of the justices in concurring unconditionally apparently would extend the holding to encompass non-capital cases. Two dissented, and one did not participate. In such a setting the modificatory remarks in the concurring opinions of Mr. Justice Frankfurter and Mr. Justice Harlan have particular significance in the application of that precedent to the case at bar.

[fol. 19] Although appellant has cited Mr. Justice Frankfurter's remarks which indicate he did not intend to imply "that the considerations that are controlling in capital cases involving civilian dependents are constitutionally irrelevant in capital cases involving civilians other than dependents or in *non-capital cases involving dependents* or other civilians," this caveat is preceded and followed by repeated references to the capital offense aspect

of the case. Thus Mr. Justice Frankfurter in his concurring opinion states:

> ". . . In making this adjudication I must emphasize that it is only the trial of civilian dependents *in a capital case* in time of peace that is in question. The Court has not before it, and therefore I need not intimate any opinion, on situations involving civilians, in the sense of persons not having a military status, other than dependents. Nor do we have before us a case involving a non-capital crime. . . :
>
> * * * *
>
> ". . . These cases involve the validity of procedural conditions for determining the *commission of a crime in fact punishable by death.* The taking of life is irrevocable. *It is in capital cases especially* that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid* v. *Covert, supra,* at pp. 45-46; emphasis added.

Concurring on a much narrower basis, Mr. Justice Harlan delineates to capital offenses his denial of courts-martial jurisdiction over civilian dependents overseas. In this connection he states:

> "On this basis, I cannot agree with the sweeping proposition that a full Article III trial, with indictment and trial by jury, *is required in every case* for the trial of a civilian dependent of a serviceman overseas. . . . Again, I need not go into details, beyond stating that except for capital offenses, such as we have here, to which, in my opinion, special considerations apply, I am by no means ready to say that Congress' power to provide for trial by court-martial of civilian dependents overseas is limited by Article III and the Fifth and Sixth Amendments. Where, if at all, the dividing line should be drawn among *cases not capital* need not now be decided. We are confronted here with capital offenses alone: *and it seems to me particularly unwise now to decide more than we have to. . . .*" *Reid* v. *Covert, supra,* at pp. 75-77; emphasis added.

[fol. 20] On the premise of the foregoing observations we believe that the cited precedents establish that the trial by courts-martial of civilian dependents in time of peace is unconstitutional only with respect to capital offenses. In summary, after weighing all of the considerations implicit in the decision of the Court in the *Covert* and *Krueger* cases, *supra*, we conclude that the necessity for military jurisdiction over dependents charged with non-capital offenses is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments.

Accordingly, the Board of Review having found the approved findings of guilty and the sentence as to each accused correct in law and fact and having determined on the basis of the entire record that they should be approved, such findings of guilty and sentence as to each accused are hereby affirmed.

/s/ Oscar M. Bisant, Jr.

/s/ James J. Scott

/s/ W. H. Blackmarr

[fols. 21-22] * * *

[fol. 25] IN THE UNITED STATES
COURT OF MILITARY APPEALS

UNITED STATES, APPELLEE

v.

JOANNA S. DIAL, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class JAMES W. DIAL, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34, and Specialist Second Class JAMES W. DIAL (RA 14233840), Company B, 2d Medium Tank Battalion (Patton), 35th Armor, APO 34

JOANNA S. DIAL, APPELLANT

CERTIFICATE FOR REVIEW

Board of Review No. 397520

Docket No. .....

To the Honorable, The Judges of the United States Court of Military Appeals:

1. Pursuant to the Uniform Code of Military Justice, Article 67(*b*)(2), the record of trial and the decision of the board of review, United States Army, in the above-entitled case, are forwarded for review.

2. The accused, Joanna S. Dial, was tried and convicted by general court-martial at Bad Kreuznach, Germany, on 29 July 1957 for a violation of the Uniform Code of Military Justice, Article 119. She was sentenced to be confined at hard labor for three years. The sentence was approved by the convening authority and was affirmed by a board of review on the 14th day of February 1958.

3. It is requested that action be taken with respect to the following issue:

DID THE COURT-MARTIAL HAVE JURISDICTION UNDER ARTICLE 2(11), UNIFORM CODE

OF MILITARY JUSTICE, TO TRY, FOR A NON-CAPITAL OFFENSE, THE ACCUSED, JOANNA S. DIAL, A PERSON ACCOMPANYING THE ARMED FORCES OF THE UNITED STATES [fol. 24] IN GERMANY IN PEACETIME AS THE DEPENDENT WIFE OF THE ACCUSED, SPECIALIST SECOND CLASS JAMES W. DIAL?

MAR 7 1958

/s/ George W. Hickman, Jr.
GEORGE W. HICKMAN, JR.
Major General, USA
The Judge Advocate General

Received a copy of the foregoing Certificate for Review this 17 day of March, 1958.

/s/ Jasper L. Searles
JASPER L. SEARLES by JGL
Colonel, JAGC
Office of The Judge Advocate General, U. S. Army
Appellate Government Counsel

/s/ Thomas J. Nichols
THOMAS J. NICHOLS
Major, JAGC
Office of The Judge Advocate General, U. S. Army
Appellate Government Counsel

/s/ John G. Lee
JOHN G. LEE
Lieutenant Colonel, JAGC
Office of The Judge Advocate General, U. S. Army
Appellate Government Counsel

/s/ William H. Keniry
WILLIAM H. KENIRY
First Lieutenant, JAGC
Office of The Judge Advocate General, U. S. Army
Appellate Government Counsel

[fol. 25] /s/ James Garnett
JAMES GARNETT
Colonel, JAGC
Office of The Judge Advocate
General, U. S. Army
Appellate Defense Counsel

/s/ Lawrence R. Fullem
LAWRENCE R. FULLEM
First Lieutenant, JAGC
Office of The Judge Advocate
General, U. S. Army
Appellate Defense Counsel

/s/ John F. Christensen
JOHN F. CHRISTENSEN
Captain, JAGC
Office of The Judge Advocate
General, U. S. Army
Appellate Defense Counsel

[fol. 26] U. S. ARMY HOSPITAL NEUBRUCKE
NEUROPSYCHIATRIC SECTION
APO 34 US ARMY

3 July 1957

RE: Mrs. Joanna DIAL, dependent wife of SP-2 James W. DIAL, RA 14 233 040, Co "B", 29th Tank Bn, APO 34, US Army.

CERTIFICATE

1. This is to certify that the above captioned individual has been psychiatrically evaluated on 25th and 27th June 1957 and on the 2d of July 1957. This evaluation was made upon the request of the Commanding Officer of Co "B", 29th Tank Bn, APO 34, US Army, in connection with the death of one of the accused's children who died on the 21st of May 1957.

2. Family and personal history reveal that the accused was born at Shelton, S. C. The father was a shoemaker, there were seven children and the economic conditions were not too good. The parents separated in 1949 and around the same time the accused quit school because she expected an illegitimate child. She has then lived first with her father and later with her mother. At times she worked, apparently without proper training, as a nurse in private homes. She married her present husband in 1954.

3. Concerning her marital life and the circumstances surrounding the death of the child, she essentially confirms the information gained from her husband, although she is much more cautious trying rather hard to cover up. She feels that her marital life is a happy one. She has no particular complaints about her husband and believes that she has been a good mother. She found it rather funny that I thought a monthly food bill of $30 seemed quite small for the size of her family and she assured me laughingly that it was very easy to satisfy everybody with her way of cooking.

4. She explained that the child in question had always been difficult to bring up. It had a bad temper, would cry much throughout the night and present a feed-

ing problem. After the birth of the last baby, however, this situation became much worse and the child would not eat at all, would have fits of temper and would not tolerate the mother to come near him. She emphatically denied that she ever beat the child herself, claiming that the husband caused all the various injuries found on the child. The husband, however, says that the mother too beat the child. In addition she claims that she actually seldom saw the beatings and got to know of them only afterwards. For example, she said that her husband did beat the oldest child the night before the baby died. She, however, "saw the scars only the next morning". [fol. 27] She knows and admits that a belt as well as a wooden plank were used to beat the children. She admits that she never did anything to prevent the beatings and that she never called for help or medical care when she saw that the children had open wounds or presented such grave problems as the now dead child did. She herself feels that it is quite natural to beat children since she got used to it in her own childhood. She claims that she did not like the beatings by her father but that at least she learned her lesson. She pretends that she did not notice any particular change in this child before it died since it had been so difficult for a long time. Although she seemed rather glad and satisfied that lately the child stopped crying so much and would only get up on all four and rock back and forth.

5. The accused felt quite indignant that she had to undergo psychiatric examination because she was quite sure that there was never anything wrong with her mentally. She leaves no doubt that she knew and knows exactly what was going on and what she herself was doing at all times. She also assured me that this is and was true also for her husband.

6. Psychometric tests showed that the accused reached an I.Q. of 90 on the Wechsler-Bellevue Intelligence Scale which places her on the border line of low average and dull normal intelligence. Her performance on other tests showed a certain sloppiness and rather poor control over her emotions. Her interpersonal relations appeared to be somewhat superficial, and her intellectual and emotional

horizon limited, however, considering her social and educational background these findings were still within the limits of normality.

7. Throughout the various interviews the accused was fairly cooperative but definitely trying to cover up and reluctant to give information. Her thought processes were normal and her emotional responses essentially adequate, although at times her behavior seemed to be rather calculated and aimed to give the impression that she was very much concerned over the death of her child. On the other hand, when she believed herself unobserved, she appeared quite relaxed, joking and totally unconcerned. Only during the last interview did she seem to be dimly aware of the seriousness of her situation.

8. Diagnostic impression: Emotional instability reaction (Immaturity reaction), with marked hostility in a rather primitive restricted and egocentric person of low average intelligence, and of poor social educational background.

9. The accused at the time of the alleged offense was so far free from mental disease, defect, or derangement as to be able, concerning the particular acts charges, to distinguish right from wrong.

[fol. 28] 10. The accused at the time of the alleged offense was so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to adhere to the right.

11. The accused does possess sufficient mental capacity to understand the nature of the proceedings against her and intelligently to conduct or cooperate in her defense.

s/ Felix Von Mendelssohn
FELIX VON MENDELSSOHN
Major MC
Chief, Neuropsychiatric Section

[fol. 29]

PROCEEDINGS OF A GENERAL COURT-MARTIAL

which met (at) Bad Kreuznach, Germany, at 1011 hours, 29 July 1957, pursuant to the following orders:

SPECIAL ORDERS No. 167

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

25 July 1957

SPECIAL ORDERS
NUMBER 167

EXTRACT

5. A general court-martial is hereby ordered to convene at Bad Kreuznach, Germany, at 1000 hours, 29 July 1957, or as soon thereafter as practicable, for the trial of Specialist Second Class James W. Dial, RA 14 233 840, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, formerly Company B, 29th Tank Battalion, and Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States, *onla*. The court will be constituted as follows:

• • • •

FOR THE COMMANDER:

W. M. ROGERS
Colonel, GS
Chief of Staff

OFFICIAL:

s Claude E. King
CLAUDE E. KING
CWO, W-2 USA
Asst Adj Gen

DISTRIBUTION:

"E" 40—SJA

• • • •

PRESIDENT: The court will come to order.

TRIAL COUNSEL: This court is convened by paragraph 5, Special Orders Number 167, this headquarters, dated 25 July 1957, a copy of which has been furnished to the law officer, each member of the court, counsel, the accused, and to the reporter for insertion in the record.

The following persons named in the appointing orders are present:

LT COL JOSEPH L CHALK (Law Officer)
Court Members

LT COL JACK R METZDORF
LT COL JOSEPH E SHEPARD
MAJ LINTON H EVANS JR
MAJ JOSE M MARTINEZ
MAJ WILLIAM E STRUBEL
MAJ HAROLD F KNAPP
CAPT JOHN W BAKER
CAPT ROMA J McDOWELL
1ST LT JAMES H THAYER
2D LT HARRY W JOHNSON

1ST LT FRANCIS R BUCKLEY (Trial Counsel)
1ST LT ARNOLD H LOZOWICK (Defense Counsel)

No person named in the appointing orders is absent.

TRIAL COUNSEL: The prosecution is ready to proceed with the trial in the case of the United States against Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, who is present in the court; and the case of Mrs. Joanna S. Dial, a person accompanying the United States armed forces without the continental limits of the United States as dependent wife of the accused Specialist Second Class James W. Dial, who is also in the court.

TRIAL COUNSEL: Mr. Edward Gans has been appointed reporter for this court and will now be sworn.

(The appointed reporter, Edward Gans, was then duly sworn.)

TRIAL COUNSEL: The legal qualifications of all members of the prosecution are correctly stated in the appointing orders.

TRIAL COUNSEL: No member of the prosecution named in the appointing orders has acted as investigating officer, law officer, court member, or as a member of the defense in this case, or as counsel for the accused at a pretrial investigation or other proceedings involving the same general matter.

[fol. 31] TRIAL COUNSEL: By whom will the accused be defended?

DEFENSE: The accused, Specialist Second Class James Dial will be defended by 1st Lieutenant Lozowick, the appointed defense counsel. The accused, Joanna S. Dial has requested that Lieutenant Robert Funk represent her as individual counsel. He has been made available by the convening authority.

TRIAL COUNSEL: And Lieutenant Funk is now present in the court?

DEFENSE: Yes, sir.

TRIAL COUNSEL: And you will represent Mrs. Dial, Lieutenant Funk?

INDIVIDUAL COUNSEL: Yes, sir.

TRIAL COUNSEL: Will counsel representing the accused state whether the legal qualifications of the appointed members of the defense are other than as stated in the appointing orders; and will individual counsel state whether he has been certified as counsel by the appropriate Judge Advocate General?

DEFENSE: The qualifications of the appointed defense counsel are correct as stated in the appointing orders.

INDIVIDUAL COUNSEL: I am an officer of the Judge Advocate General Corps. I have been certified as counsel and have the legal qualifications as enumerated in Article 27b (1), PCMJ.

LAW OFFICER: Before you go any further, I would like to ask one question, Lieutenant Lozowick. You are also representing Mrs. Dial, is that right? You are appointed counsel for both accused.

DEFENSE: I was appointed counsel for both of them, sir. When the request for Lieutenant Funk was proc-

essed, I then no longer represented her, but represented the interests of Specialist Dial, and Lieutenant Funk represented her interests. This was to avoid any possible conflict of interests. I have not represented her since that date.

LAW OFFICER: But you are originally the appointed counsel for both.

DEFENSE: That is correct.

LAW OFFICER: Was it her desire that once she obtained the services of the requested counsel, that you should no longer serve her as defense counsel?

DEFENSE: Yes, sir.

LAW OFFICER: Is that her wish?

DEFENSE: Yes, sir.

[fol. 32] LAW OFFICER: In other words, she is dispensing with your services as far as the trial is concerned, but you were appointed trial counsel for her originally, is that correct?

DEFENSE: That is correct.

LAW OFFICER: All right; proceed.

TRIAL COUNSEL: Has any member of the defense, or individual counsel, acted as the accuser, a member of the prosecution, investigating officer, law officer, or member of the court in this case?

DEFENSE: No member of the defense has so acted.

TRIAL COUNSEL: Has individual counsel so acted?

INDIVIDUAL COUNSEL: No, sir.

LAW OFFICER: It appears that counsel for both sides have the requisite qualifications.

LAW OFFICER: Now, has the accused Specialist Dial made a request in writing that the membership of this court be composed of enlisted persons?

TRIAL COUNSEL: He has not made such a request.

LAW OFFICER: Have you fully explained that right to him?

DEFENSE: Yes, sir.

LAW OFFICER: And you are satisfied that he understood that right, and it is his desire that there not be enlisted members on the court.

DEFENSE: That is correct.

LAW OFFICER: All right, proceed to convene the court.

TRIAL COUNSEL: The court will be sworn.

(The members of the court, the law officer, personnel of the prosecution and defense were then duly sworn.)

LAW OFFICER: The court is now convened.

TRIAL COUNSEL: The general nature of the charges in this case is that each accused is charged with involuntary manslaughter in violation of Article 119 of the Uniform Code of Military Justice. The charges were preferred by Captain Noel D. Knotts, forwarded with recommendations as to disposition by Lieutenant Colonel Glenn W. Zarger and Colonel Rudolph Barlow, and investigated by Major George I. Whitmore.

TRIAL COUNSEL: Neither the law officer nor any member of the court will be a witness for the prose-u- [fol. 33] tion. If any member of the court is aware of any facts which he believes may be a ground for challenge by either side against him, he should now state such facts.

LAW OFFICER: Apparently there are none; and that extends to the law officer, too. You did not include me in your statement, but I will so consider it.

TRIAL COUNSEL: The prosecution has no challenge for cause. The prosecution has no peremptory challenge.

TRIAL COUNSEL: Does the accused wish to challenge any member of the court or the law officer for cause?

DEFENSE: The accused, Specialist Second Class James W. Dial, does not desire to challenge any member of the court or law officer for cause.

INDIVIDUAL COUNSEL: The accused, Joanna S. Dial, does not desire to challenge any member of the court or the law officer for cause.

TRIAL COUNSEL: Does the accused Specialist Second Class Dial wish to exercise his right to a peremptory challenge against any member?

DEFENSE: He does not.

TRIAL COUNSEL: Does the accused Joanna S. Dial wish to exercise her right to one peremptory challenge?

INDIVIDUAL COUNSEL: She does not.

TRIAL COUNSEL: The charges have been properly referred to this court for trial. With the consent of the

accused, I shall omit the reading of the charges, a copy of which is before each member of the court, the law officer and the accused. The charges have been signed by Captain Noel D. Knotts, a person subject to the code, as accuser; are properly sworn to before an officer of the armed forces authorized to administer oaths, and this is true in connection with each accused; and are properly referred to this court for trial by Major General W. Paul Johnson, the convening authority, with instructions that these cases be tried in common trial.

The charges and specifications, the name and description of the accuser, his affidavits, and the references for trial will be copied verbatim into the record.

DEFENSE: The accused consents.

INDIVIDUAL COUNSEL: The accused, Joanna S. Dial, consents.

LAW OFFICER: The court will waive reading of the charges.

[fol. 34] ARRAIGNMENT

As to James W. Dial, Specialist Second Class:

CHARGE: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, did, at Baumholder, Germany, on or about 21 May 1957, by perpetrating offenses directly affecting the person of James W. Dial, Junior, to wit: batteries during a period of several weeks immediately preceding 21 May 1957, unlawfully kill the said James W. Dial, Junior, by striking him upon the head and body with his hands, an electric extension cord, pieces of wood, and a web belt, and by striking the head of the said James W. Dial, Junior, against a crib headboard.

[fol. 35] As to Specialist Second Class James W. Dial.

Typed Signature of Accuser:

/s/ Noel D. Knotts
/t/ Noel D. Knotts

Rank:
Captain, Armor

Organization:
Company "B", 29th Tank Bn, APO 34, US Army

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 29th day of June, 1957, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

/s/ William W. Miller (Typed signature)

2d Lt, Headquarters 29th Tank Bn (Rank and organization of officer administering oath)

Officer administering oath must be a commissioned officer.

Adjutant (Official character, as Adjutant, Summary Court, etc. See paragraph 29*c*, MCM, 1951, and articles 30*a* and 136.)

1ST INDORSEMENT

Headquarters 2d Armored Division (Designation of command of convening authority)

APO 42, US Army (Place)

26 July 1957 (Date)

Referred for trial to the General court-martial appointed by Paragraph 5 Special Orders Number 167, Headquarters 2d Armored Division, APO 42, US Army dated, 25 July 1957, subject to the following instructions: to be tried in a common trial with Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial.

By—For the Commander—of .....(Command or order)

s/ Claude E. King /t/ CLAUDE E. KING
CWO, W-2 USA
Asst Adj Gen

(Typed signature, rank, and official capacity of officer signing)

This page will follow the charges and specifications which are to be copied verbatim into the record at the point indicated in the sidenote "Arraignment" at page 507, MCM, 1951.

[fol. 36] ARRAIGNMENT

As to Joanna S. Dial, Dependent Wife:

CHARGE: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, did, at Baumholder, Germany, on or about 21 May 1957, by perpetrating offenses directly affecting the person of James W. Dial, Junior, to wit: batteries during a period of several weeks immediately preceding 21 May 1957, unlawfully kill the said James W. Dial, Junior, by strik-

ing him upon the head and body with her hands, an electric extension cord, pieces of wood, and a web belt.

[fol. 37] As to Dependent Wife Joanna S. Dial.

/s/ Noel D. Knotts
/t/ Noel D. Knotts

(Typed Signature of Accuser)

Captain, Armor (Rank)

Company "B", 29th Tank Bn, APO 34, US Army (Organization)

AFFIDAVIT

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 29th day of June, 1957, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

/s/ William W. Miller (Typed signature)

2d Lt, Headquarters 29th Tank Bn (Rank and organization of officer administering oath)

Officer administering oath must be a commissioned officer.

Adjutant (Official character, as Adjutant, Summary Court, etc. See paragraph 29c, MCM, 1951, and articles 30a and 136.)

1ST INDORSEMENT

Headquarters 2d Armored Division (Designation of command of convening authority)

APO 42, US Army (Place)

26 July 1957 (Date)

Referred for trial to the General court-martial appointed by paragraph 5 Special Orders Number 167, Headquarters 2d Armored Division, APO 42, US Army dated, 25 July 1957, subject to the following instructions: to be tried in a common trial with Specialist Second Class James W. Dial, RA 14 233 840, Company B, 2d Medium Tank Battalion, 35th Armor.
Command or order:

By—For the Commander—of.....(Command or order)

/s/ Claude E. King /t/ Claude E. King
CWO, W-2 USA
Asst Adj Gen

(Typed signature, rank, and official capacity of officer signing)

This page will follow the charges and specifications which are to be copied verbatim into the record at the point indicated in the sidenote "Arraignment" at page 507, MCM, 1951.

[fol. 38] TRIAL COUNSEL: The charges were served on each accused by me on 12 July 1957.

TRIAL COUNSEL: Specialist Second Class Dial, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

DEFENSE: The accused Specialist Second Class James W. Dial pleads:

To the Specification and the Charge: Guilty.

TRIAL COUNSEL: Joanna S. Dial, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charges or to grant other relief should be made at this time.

INDIVIDUAL COUNSEL: Sir, I move that the charges against the defendant, Joanna S. Dial, be dismissed on the ground that the court-martial has no jurisdiction over the person of a civilian for trial on charges of this nature.

LAW OFFICER: Do you have any argument in support of your move?

INDIVIDUAL COUNSEL: No, sir.

LAW OFFICER: Is there any rebuttal by the trial counsel?

TRIAL COUNSEL: No, sir.

LAW OFFICER: The motion is denied.

INDIVIDUAL COUNSEL: The accused Joanna S. Dial pleads:

To the Charge and Specification: Guilty.

LAW OFFICER: At this time I would like to ask the members of the court to withdraw so that the law officer, counsel for both sides, the accused and the reporter can enter into a closed session out of the hearing of the court.

(The court then recessed at 1023 hours, 29 July 1957, until 1032 hours, 29 July 1957, during which time an out-of-court hearing was held, attended by the law officer, counsel for both sides, both accused, and the reporter.)

PRESIDENT: The court will come to order.

TRIAL COUNSEL: All parties to the trial who were present when the court recessed are again present.

LAW OFFICER: Let the record reflect that during the absence of the members of the court an out-of-court hearing was conducted between the parties to the trial, the two accused, and the reporter and law officer; that the out-of-court hearing will be recorded and made a [fol. 39] part of this record as an appellate exhibit, Appellate Exhibit 3.

LAW OFFICER: One statement for the record: the court has accepted the plea of guilty of each accused.

You may proceed.

TRIAL COUNSEL: The prosecution has no legal authorities to present to the court. Does the defense desire to present legal authorities at this time?

DEFENSE: The defense does not.

TRIAL COUNSEL: The prosecution has no opening statement. The prosecution rests.

DEFENSE: The accused Specialist Dial's rights to testify as a witness on the merits have been explained to him by me, and he does not desire to so testify. The defense rests as to Specialist Dial.

LAW OFFICER: Before you go further, are you satisfied that he understands his rights in that regard?

DEFENSE: Yes, sir, I am.

LAW OFFICER: You do not, then, desire me to instruct him any further in that regard.

DEFENSE: I don't think it will be necessary.

INDIVIDUAL COUNSEL: Accused Joanna S. Dial's rights to testify in her own behalf have been explained to her, and she does not desire to take the stand at this time. The defense rests as to Joanna Dial.

LAW OFFICER: You are satisfied that she understands her rights as a witness?

INDIVIDUAL COUNSEL: I am.

LAW OFFICER: And you do not desire me to instruct her further.

INDIVIDUAL COUNSEL: No, sir.

TRIAL COUNSEL: The prosecution has no further evidence to offer. Does the defense have any further evidence to offer?

DEFENSE: The defense does not.

TRIAL COUNSEL: Does the court wish to have any witnesses called?

PRESIDENT: The court does not.

[fol. 40] TRIAL COUNSEL: The prosecution waives argument.

DEFENSE: The defense waives argument.

LAW OFFICER: Has the prosecution anything further?

TRIAL COUNSEL: No, sir.

LAW OFFICER: Does the defense have anything further?

DEFENSE: No, sir.

LAW OFFICER: The court is instructed that a plea of guilty standing before the court is a complete confession of guilt of the offense to which the plea relates and justifies a finding of guilty of such offense. A plea of guilty admits each and every element of the offense to which it relates, and, as to such offense, removes the presumption of innocence, eliminates the requirement that the Government establish its case beyond a reasonable doubt, and does away with the necessity of offering proof to sustain the degree of guilt.

In this case each of the accused has entered a plea of guilty to the specification and charge, which plea still stands. Consequently, no further issue as to the guilt or innocence of either of the accused as to this offense remains to be resolved. However, under the code, you are required to make findings in closed session as to all charges and specifications regardless of whether the accused has pleaded guilty or not guilty thereto.

I might state that the findings should be arrived at separately as to each accused. They are on trial here today as individuals. The findings should be announced as to each accused separately.

Are there any questions by the court members?

PRESIDENT: Apparently there are none.

LAW OFFICER: The court will be closed.

(The court then closed at 1027 hours, 29 July 1957, until 1043 hours, 29 July 1957.)

PRESIDENT: The court will come to order.

TRIAL COUNSEL: All parties to the trial who were present when the court closed are again present.

LAW OFFICER: I would like the record to reflect that prior to the closing of the court all manuals were taken from the members of the court, and that during their deliberations in closed session, they were not in possession of manuals.

[fol. 41] FINDINGS

PRESIDENT: Specialist Second Class James W. Dial, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, all of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of the Specification and Charge: GUILTY.

PRESIDENT: Mrs. Joanna S. Dial, it is my duty as president of this court to inform you that the court, in closed session, upon secret written ballot, all of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of the Specification and Charge: GUILTY.

LAW OFFICER: The court will now hear the personal data concerning the accused shown on the charge

sheet, and will receive evidence of previous convictions if any.

TRIAL COUNSEL: The charge sheet in the case of James W. Dial shows the following information concerning the accused:

Accused: Dial, James W.
Service Number: RA 14 233 840
Grade: Specialist Second Class
Date of Birth: 12 November 1928
Organization and Armed Force: Company "B", 29th Tank Battalion, APO 34, US Army
Contribution to Family or Quarters Allowance: None
Pay Per Month: Basic: $210.60; *Foreign Duty:* 16.00; *Total:* 226.60
Initial Date of Current Service: 8 March 1954
Term of Current Service: Six (6) years
Prior Service: 1: Seven (7) years and twenty (20) days; 2. DATE ARRIVED IN USAREUR: 23 October 1954
Data as to Restraint: Arrest of Quarters, 23 May 1957, Building Nr. 8303, Harold D. Smith Barracks, Baumholder, Germany

Are these data correct?

DEFENSE: Yes, they are.

TRIAL COUNSEL: The charge sheet as to Joanna S. Dial shows the following information: "Dial, Joanna S.; Passport Number 102 142; Dependent Wife; Date of [fol. 42] Birth, 31 December 1934; Description: The accused is a civilian accompanying the armed forces in Germany as the dependent wife of Specialist Second Class James W. Dial." Of course, there is no information on pay per month, and there is no information as to data as to any restraint.

Are these data correct?

INDIVIDUAL COUNSEL: They are.

TRIAL COUNSEL: I have evidence of no previous convictions as to either of the accused.

TRIAL COUNSEL: Request the reporter mark this document, consisting of two pages and four photographs which are incorporated by reference and numbered 1a, 1b, 1c and 1d, the photographs being so numbered, be marked as one exhibit, Prosecution Exhibit 1 for identification.

(Reporter complies)

TRIAL COUNSEL: The record should note that I have handed Prosecution Exhibit 1 for identification to regularly appointed defense counsel.

(Document tendered)

TRIAL COUNSEL: Let the record also note that after it has been perused, I now show it to the individual counsel for Mrs. Dial.

(Document tendered)

TRIAL COUNSEL: Prosecution offers in evidence as Prosecution Exhibit 1, Prosecution Exhibit 1 for identification, a stipulation consisting of two pages and four photographs which are incorporated by reference, the photographs being numbered 1a, 1b, 1c and 1d.

LAW OFFICER: The exhibit will be received and marked as requested. You may read it if you desire.

(The trial counsel then read the stipulation to the court, same being appended to the record of trial as Prosecution Exhibit 1.)

TRIAL COUNSEL: I might add that the photographs referred to are attached to and are part of this exhibit.

TRIAL COUNSEL: The prosecution has nothing further.

DEFENSE: The defense would request that Specialist Dial be instructed as to his rights to present evidence in mitigation and extenuation.

LAW OFFICER: Specialist Dial, you are advised that you may now present evidence in extenuation and mitigation of the offense of which you stand convicted. You may, if you wish, testify under oath as to such matters, or you may remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offense of which you stand convicted. This unsworn statement is not evidence, and you cannot be cross-examined upon it, but the [fol. 43] prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself, or it may be made by your counsel, or by both of you. Consult with your counsel and advise the court what you desire to do.

(Accused confers with counsel)

ACCUSED SPECIALIST DIAL: Sir, I do not desire to present any evidence. I do not desire to make any more evidence to what already exists.

INDIVIDUAL COUNSEL: Sir, I request that the defendant Joanna S. Dial be advised of her rights to present evidence in extenuation and mitigation.

LAW OFFICER: Mrs. Dial, you are advised that you may now present evidence in extenuation or mitigation of the offense of which you stand convicted. You may, if you wish, testify under oath as to such matters, or you may remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offense of which you stand convicted. This unsworn statement is not evidence, and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself, or it may be made by your counsel, or by both of you. Consult with your counsel and advise the court what you desire to do.

(Accused confers with counsel)

ACCUSED MRS. DIAL: I do not wish to present evidence.

LAW OFFICER: Does the defense counsel have anything further?

DEFENSE: No, sir.

LAW OFFICER: The court is advised that the maximum punishment as far as Specialist Dial is concerned, is a dishonorable discharge, total forfeitures, and confinement at hard labor for three years. As to Mrs. Dial, the maximum punishment is confinement at hard labor for three years.

I might further add, with regard to the case concerning Mrs. Dial, that a fine may be imposed against her in addition to the confinement, or, for that matter, in lieu of, whatever the court so determines. Forfeitures is not an appropriate sentence to be imposed against a civilian. Now, in order to enforce collection, a fine is usually accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall,

in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired.

Once again, the sentence should be arrived at separately, should be announced separately, and the required fraction for this type of sentence is two-thirds. So, re- [fol. 44] gardless of the majority in reaching the sentence, only two-thirds should be announced.

Let the record reflect that the manual of courts-martial has been withdrawn from the court. The court will not have a manual during its deliberations of the sentence.

The court will be closed.

(The court then closed at 1058 hours, 29 July 1957, until 1108 hours, 29 July 1957.)

PRESIDENT: The court will come to order.

TRIAL COUNSEL: All parties to the trial who were present when the court closed are again present.

SENTENCE

PRESIDENT: Specialist Second Class Dial, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you:

> To be dishonorably discharged from the service, and to forfeit all pay and allowances, and to be confined at hard labor for three years.

PRESIDENT: Mrs. Dial, it is my duty as president of this court to inform you that the court, in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you:

> To be confined at hard labor for three years.

LAW OFFICER: Have you any other cases to try at this time?

TRIAL COUNSEL: The prosecution has no other cases to try at this time.

PRESIDENT: The court will be adjourned.

(The court then adjourned at 1110 hours, 29 July 1957.)

[fol. 45] AUTHENTICATION OF RECORD OF TRIAL

in the case of

The United States against Specialist Second Class James W. Dial and Joanna S. Dial, Dependent Wife, SP 2 Dial of Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company "B", 29th Tank Battalion, APO 34, US Army.

/s/ Jack R. Metzdorf
JACK R. METZDORF
Lt Col Armor
President

/s/ Joseph L. Chalk
JOSEPH L. CHALK
Lt Col JAGC
Law Officer

I have examined the record of trial in the foregoing case.

/s/ Arnold H. Lozowick
ARNOLD H. LOZOWICK
1st Lt JAGC
Defense Counsel

/s/ Robert N. Funk
ROBERT N. FUNK
1st Lt JAGC
Individual Counsel

[1] Delete inapplicable term. Trial counsel may not authenticate a general court-martial record.

[fol. 46]

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

In the foregoing case of Specialist Second Class James W. Dial, RA 14 233 840, U. S. Army Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, 2d Armored Division, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, the accused will be confined in the United States Army Branch Disciplinary Barracks, New Cumberland, Pennsylvania.

W. Paul Johnson
Major General, USA
Commanding

[fol. 47]

HEADQUARTERS
2D ARMORED DIVISION
APO 42 US ARMY

9 September 1957

In the foregoing case of Joanna D. Dial, also known as Joanna S. Dial, a person accompanying the Armed Forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial, RA 14 233 840, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion, 2d Armored Division, the sentence is approved. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review, the accused will be confined in the Federal Reformatory for Women, Alderson, West Virginia.

W. Paul Johnson
Major General, USA
Commanding

[fol. 48] PROSECUTION EXHIBIT 1

STIPULATION

It is hereby stipulated and agreed by and between the prosecution and defense, by and with the consent of the accused, Specialist Second Class James W. Dial, U. S. Army, Company B, 2d Medium Tank Battalion (Patton), 35th Armor, formerly Company B, 29th Tank Battalion and Joanna S. Dial, a person accompanying the armed forces of the United States without the continental limits of the United States as the dependent wife of Specialist Second Class James W. Dial that the following facts are true:

Prior to the dates alleged in the specification, the accused occupied Government quarters at Apartment 3-F, Building 8828, Fallenberg Housing Area, Baumholder, Germany with their dependent children, Harry E. Singleton (date of birth 6 June 1952), stepson of the accused James W. Dial, natural son of accused Joanna S. Dial; Reginald E. Dial (date of birth 12 May 1954); James W. Dial, Junior, the deceased (date of birth 14 March 1956); and Deborah M. Dial (date of birth 18 March 1957).

In chastising the deceased child, James W. Dial, Junior, on numerous occasions during the several weeks preceding 21 May 1957, both accused beat him about the head and body with their hands, a military web belt, pieces of wood from a milk crate, and an electric extension cord. These beatings were inflicted because the child would not eat and to make him stop crying. These beatings were usually inflicted in fits of temper.

On about 17 May 1957, the deceased child was crying, and in an effort to stop his crying, the accused, Specialist Second Class James W. Dial, deliberately and forcibly struck the head of James W. Dial, Junior against the headboard of his crib.

On the morning of 21 May 1957, after the accused, Specialist Second Class James W. Dial had gone to work, the accused, Mrs. Joanna S. Dial, attempted to feed their child James W. Dial, Junior, but he would not eat; so

she put him back in his crib. She went back to the kitchen and then heard James scream. She went to him. He was screaming, lying on his back, breathing heavily, his lips pushed out, his eyes rolled back in his head, and he was kicking his legs and rolling his head from side to side. She telephoned her husband, the accused Specialist Second Class Dial, and told him to come home. He did come home and called an ambulance. She then removed the child's blood-stained undershirt, put on a clean shirt, changed his diaper and placed the child on the living-room couch. The ambulance arrived and the child was transported to the hospital, where he was pronounced dead on arrival at 1155 hours, 21 May 1957.

The attached photographs, numbered 1a, 1b, 1c, and 1d, accurately represent the condition of the body of the deceased child with regard to external injuries when he was pronounced dead on arrival at the hospital. The exoriation, maceration and scarring of the skin in the area of the genitals and anus were caused by lack of proper hygenic care of the child. Other visible wounds not depicted in the attached photographs include a swollen, lacerated upper lip and an open bloody wound below [fol. 49] the right eye. In addition to the visible wounds, an autopsy revealed a "V" shaped fracture over 13 centimeters in length in the left parietal bone of the skull, with some underlying brain damage, and ruptures of both lobes of the liver. It was further determined by autopsy that the deceased was undernourished and anemic. The fractured skull had been sustained between four (4) and ten (10) days prior to death and the ruptured liver was sustained between twelve (12) and thirty-six (36) hours before death. There was no finding by autopsy of any disease or other natural cause of death. Medical attention for such wounds and injuries was neither sought nor administered by either accused until the child was brought to the hospital on 21 May 1957, although many of the visible wounds were inflicted at least two (2) weeks prior to 21 May 1957.

The death of James W. Dial, Junior was the result of the wounds and injuries inflicted upon him by both accused.

/s/ Arnold H. Lozowick
ARNOLD H. LOZOWICK
1st Lt JAGC
Defense Counsel

/s/ Robert N. Funk
ROBERT N. FUNK
1st Lt JAGC
Defense Counsel

/s/ James W. Dial
JAMES W. DIAL
SP 2 RA 14 233 840
Accused

/s/ Joanna S. Dial
JOANNA S. DIAL
Depn Wife PP #102 142
Accused

/s/ Francis R. Buckley
1st Lt JAGC
Trial Counsel

[fol. 50] APPELLATE EXHIBIT "1"

Guilty Plea in the General Court-Martial Case of Joanna S. Dial, Dependent Wife of Specialist Second Class James W. Dial

AETAJA 250.45
CG

SJA

24 July 1957
Lt Col Husband/js 8317

1. The following court-martial charges against Joanna S. Dial, dependent wife of Specialist Second Class James W. Dial, alleging a joint offense with Specialist Second Class James W. Dial, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, formerly Company B, 29th Tank Battalion, have been referred to a general court-martial for trial:

a. Charge: Violation of the Uniform Code of Military Justice, Article 118.

b. Specification 1: Acting jointly and in pursuance of a common intent with Specialist Second Class James W. Dial, did, at Baumholder, Germany, on or about 21 May 1957, murder James W. Dial, Junior, by means of inflicting numerous beatings upon the head and body of the said James W. Dial, Junior, during a period of several weeks preceding 21 May 1957, with instrumentalities and means likely to produce grievous bodily harm, to wit: their hands, an electric extension cord, a piece of wood, and a web belt, and by forcibly striking the head of the said James W. Dial, Junior, against a crib headboard.

c. Specification 2: Acting jointly and in pursuance of a common intent with Specialist Second Class James W. Dial, did, at Baumholder, Germany, on or about 21 May 1957, murder James W. Dial, Junior, by wrongfully and willfully failing in their duty as parents of the said James W. Dial, Junior, to seek and provide adequate medical care and attention for wounds and injuries about the head and body suffered by the said James W. Dial, Junior, in the course of beatings inflicted by them during a period of several weeks preceding 21 May 1957, which

failure in their parental duty resulted in the death of the said James W. Dial, Junior, from said wounds and injuries.

d. The accused's age is 22 years and 6 months.

2. Attached is a written offer signed by the accused and witnessed by her individual military defense counsel, dated 23 July 1957, in which the accused states that she will enter a plea of guilty to the lesser included offense of involuntary manslaughter of James W. Dial, Junior, under Article 119, Uniform Code of Military Justice, if it is agreed that the accused will not be prosecuted on the original charge of unpremeditated murder.

3. Recommend that the accused's offer be accepted and that charges against the accused alleging that she separately committed the lesser included offense of involuntary manslaughter in violation of Article 119, Uniform Code of Military Justice, be tried in a common trial with similar charges against her husband, Specialist Second Class James W. Dial.

1 Incl

Guilty Plea Offer

HOWARD O. HUSBAND
Lt Col, JAGC
Staff Judge Advocate

[fol. 51] 1. The offer is accepted.

2. Joanna S. Dial, dependent wife of Specialist Second Class James W. Dial, will be tried on charges alleging that she separately committed the lesser included offense of involuntary manslaughter, and in a common trial as recommended.

1 Incl

n/c

W. PAUL JOHNSON
Maj Gen, USA
Commanding

[fol. 52] COMPANY B
2D MEDIUM TANK BATTALION (PATTON)
35TH ARMOR
APO 34 US ARMY

23 July 1957

Commanding General
2d Armored Division
APO 42, US Army

Dear Sir:

In reference to my impending trial by general court-martial on charges alleging two specifications in violation of Article 118(2), Uniform Code of Military Justice, I will enter a plea of guilty to the lesser-included offense of involuntary manslaughter of James W. Dial, Junior, under Article 119(b), Uniform Code of Military Justice, if it is agreed that I will not be prosecuted on the original charge. This offer is not to be construed as consent on my part to the exercise of jurisdiction over me by the military court.

/s/ Joanna S. Dial
JOANNA S. DIAL
Dependent wife of Specialist
Second Class James W. Dial,
RA 14 233 840

Witnessed by:

/s/ Robert N. Funk
ROBERT N. FUNK
1st Lt JAGC
Individual Military Defense Counsel

[fol. 53] APPELLATE EXHIBIT "2"

Guilty Plea in the General Court-Martial Case of Specialist Second Class James W. Dial

AETAJA 250.45
CG

SJA

24 July 1957

Lt Col Husband eg 8317

1. The following court-martial charges against Specialist Second Class James W. Dial, Company B, 2d Medium Tank Battalion (Patton) 35th Armor, formerly Company B, 29th Tank Battalion, alleging a joint offense with Joanna S. Dial, dependent wife of Specialist Second Class James W. Dial have been referred to a general court-martial for trial:

a. Charge: Violation of the Uniform Code of Military Justice, Article 118.

b. Specification 1: Acting jointly and in pursuance of a common intent with Joanna S. Dial, dependent wife of the said Specialist Second Class James W. Dial, did, at Baumholder, Germany, on or about 21 May 1957, murder James W. Dial, Junior, by means of inflicting numerous beatings upon the head and body of the said James W. Dial, Junior, during a period of several weeks preceding 21 May 1957, with instrumentalities and means likely to produce grievous bodily harm, to wit: their hands, an electric extension cord, a piece of wood, and a web belt, and by forcibly striking the head of the said James W. Dial, Junior, against a crib headboard.

c. Specification 2: Acting jointly and in pursuance of a common intent with Joanna S. Dial, dependent wife of the said Specialist Second Class James W. Dial, did, at Baumholder, Germany, on or about 21 May 1957, murder James W. Dial, Junior, by wrongfully and willfully failing in their duty as parents of the said James W. Dial, Junior, to seek and provide adequate medical care and attention for wounds and injuries about the head and body suffered by the said James W. Dial, Junior,

in the course of beatings inflicted by them during a period of several weeks preceding 21 May 1957, which failure in their parental duty resulted in the death of the said James W. Dial, Junior, from said wounds and injuries.

d. Personal data concerning the accused:

(1) Age: 28 years, 8 months.
(2) Prior Service: 7 years, 20 days.
(3) Current Service: Enlisted 8 March 1954 for 6 years.
(4) Previous Convictions: None
(5) Immediate commander's statement as to character of accused's service prior to the offenses charged: Good

[fol. 54] 2. Attached is a written offer signed by the accused and witnessed by the defense counsel, dated 23 July 1957, in which the accused states that he will enter a plea of guilty to the lesser-included offense of involuntary manslaughter of James W. Dial, Junior, under Article 119, Uniform Code of Military Justice, if it is agreed that the accused will not be prosecuted on the original charge of unpremeditated murder.

3. Recommend that the accused's offer be accepted, and that charges against the accused alleging that he separately committed the lesser-included offense of involuntary manslaughter in violation of Article 119, Uniform Code of Military Justice, be tried in a common trial with similar charges against Joanna S. Dial, dependent wife of the accused.

1 Incl:

Guilty Plea Offer

HOWARD O. HUSBAND
Lt Col, JAGC
Staff Judge Advocate

To: SJA From: CG Date: 24 July 1957
Comment Nr 2

1. The offer is accepted.

2. Specialist Second Class James W. Dial will be tried on charges alleging that he separately committed the lesser-included offense of involuntary manslaughter, and in a common trial as recommended.

1 Incl
n/c

W. PAUL JOHNSON
Maj Gen, USA
Commanding

[fol. 55]

COMPANY B
2D MEDIUM TANK BATTALION (PATTON)
35TH ARMOR
APO 34 US ARMY

23 July 1957

Subject: Offer of Guilty Plea; Trial by General Court-Martial

To: Commanding General
2d Armored Division
APO 42, US Army

1. Reference is made to my impending trial by general court-martial on charges alleging two specifications in violation of Article 118(2), Uniform Code of Military Justice.

2. I will enter a plea of guilty to the lesser-included offense of involuntary manslaughter of James W. Dial, Junior, under Article 119(b), Uniform Code of Military Justice, if it is agreed that I will not be prosecuted on the original charge.

/s/ James W. Dial
JAMES W. DIAL
Specialist Second Class
RA 14 233 840

Witnessed by:

/s/ Arnold H. Lozowick
ARNOLD H. LOZOWICK
1st Lt JAGC
Defense Counsel

[fol. 56] APPELLATE EXHIBIT "3"

OUT-OF-COURT-HEARING

(The out-of-court hearing convened at 1023 hours, 29 July 1957)

LAW OFFICER: Let the record reflect that the members of the court have withdrawn, and present at this out-of-court hearing are counsel for both sides, two accused, the law officer and the reporter.

LAW OFFICER: Now, was there a pre-trial agreement in connection with each accused's plea of guilty?

TRIAL COUNSEL: Yes, sir, there was a written agreement which is now in the hands of the defense counsel.

LAW OFFICER: May I see those agreements, please?

(Documents tendered)

TRIAL COUNSEL: Amend my last statement to "There were two written agreements, one of each accused."

LAW OFFICER: These agreements will be received by the court and marked Appellate Exhibits 1 and 2, respectively. Appellate Exhibit 1 will be the agreement tendered by Mrs. Dial; and Appellate Exhibit 2 will be the agreement tendered by Specialist Dial.

Now, Mrs. Dial, I would like to ask you a few questions. Do you understand this agreement, this offer that you made to the convening authority?

ACCUSED MRS. DIAL: I do.

LAW OFFICER: As I understand it, the charge originally was a more serious charge, is that correct?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: And you offered to plead guilty if the convening authority in turn agreed to reduce that charge to involuntary manslaughter, is that correct?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: Do you understand that regardless of what sentence is imposed upon you by this court, the terms of this agreement do not require the convening authority to make any reduction of your sentence?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: You do understand that.

ACCUSED MRS. DIAL: Yes.

[fol. 57] LAW OFFICER: Now, I would like to ask you, Mrs. Dial, are you satisfied with the counsel that has been furnished you to prepare your defense and conduct your defense?

ACCUSED MRS. DIAL: Yes, I am.

LAW OFFICER: And are you pleading guilty because you are satisfied in your own mind that you are guilty?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: Now, Specialist Dial, do you understand this agreement that you have entered into with the convening authority?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: Now, I understand that originally there was preferred against you a more serious charge, is that correct?

ACCUSED SPECIALIST DIAL: Yes, sir. There was, sir.

LAW OFFICER: And I understand also, am I correct, that you offered to the convening authority to plead guilty providing he would reduce the charge to a charge of involuntary manslaughter.

ACCUSED SPECIALIST DIAL: Yes, sir; that's right.

LAW OFFICER: Do you understand that regardless of the sentence this court gives you, imposes upon you, the convening authority is not required to make any reduction in the sentence under the terms of that agreement?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: Are you satisfied with counsel appointed to defend you?

ACCUSED SPECIALIST DIAL: Yes, sir; I am, sir.

LAW OFFICER: And you are pleading guilty because you are satisfied in your own mind that you are guilty?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: I would like to advise both of you, Specialist Dial and Mrs. Dial, that you may withdraw your plea of guilty and substitute therefor a plea of not guilty at any time before the court imposes sentence upon you. Do you understand that?

ACCUSED SPECIALIST DIAL: Yes, sir.

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: I wonder if I can have counsel up here for a moment.

(A side-bar conference was held.)

LAW OFFICER: Now, this instruction applies to both of you: You have pleaded guilty to the specification and charge. By so doing, you have admitted every act or omission charged, and every element of that included offense. Your plea subjects you to a finding of guilty [fol. 58] without further proof of that offense, in which event you may be sentenced by the court to the maximum punishment authorized for it. In this case the maximum punishment is, in your case, Specialist Dial, a dishonorable discharge, total forfeitures, confinement at hard labor for three years. Mrs. Dial, in your case the maximum punishment would be confinement at hard labor for three years and whatever fine the court found appropriate, if it determined a fine was appropriate.

Now, you are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt of that offense. Your plea will not be accepted unless you understand its meaning and effect.

Mrs. Dial, do you understand?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: And understanding this, do you persist in your plea of guilty?

ACCUSED MRS. DIAL: Yes.

LAW OFFICER: Specialist Dial, do you understand my instructions?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: And understanding this instruction, do you persist in your plea of guilty?

ACCUSED SPECIALIST DIAL: Yes, sir.

LAW OFFICER: Very well, the court will accept the pleas of both accused.

That terminates the out-of-court hearing, and we will call the court back in.

(The out-of-court hearing then adjourned at 1032 hours, 29 July 1957.)

[fol. 59] UNITED STATES COURT OF MILITARY APPEALS

No. 11,425

UNITED STATES, APPELLEE

v.

JOANNA S. DIAL, Dependent Wife of Specialist Second Class James W. Dial, U. S. Army, APPELLANT

On Certification from The Judge Advocate General of the United States Army

Decided August 26, 1958

Captain Arnold I. Melnick argued the cause for Appellant, Accused. With him on the brief were *Colonel James Garnett* and *Captain John F. Christensen.*

First Lieutenant William H. Keniry argued the cause for Appellee, United States. With him on the brief were *Colonel J. L. Searles* and *Major Thomas J. Nichols.*

OPINION OF THE COURT

ROBERT E. QUINN, Chief Judge:

The accused and her husband were charged with causing the death of their one-year-old son. They were convicted by a general court-martial [1] in Germany of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice, 10 USC § 919. A board of review affirmed the conviction. The Judge Advocate General of the Army filed a certificate requesting this Court

[1] CM 397520

to consider whether the court-martial had constitutional power to try the accused as a civilian dependent accompanying the Army in West Germany.

[fol. 60] Article 2 (11) of the Uniform Code, 10 USC § 802, confers jurisdiction upon a court-martial to try civilian dependents of service personnel who accompany the armed forces outside of the continental limits of the United States. Last year the United States Supreme Court by divided vote held that the congressional grant of power was unconstitutional as applied to a civilian dependent charged with a capital offense in time of peace. The majority opinion written by Justice Black and concurred in by the Chief Justice and Justices Douglas and Brennan contains dictum to the effect that, under the Constitution, Congress cannot subject civilian dependents accompanying the armed forces abroad in peacetime to court-martial jurisdiction regardless of the nature of the offense. The other concurring Justices, Frankfurter and Harlan, specifically limited their agreement with Mr. Justice Black; they concurred on the ground that the offense charged was capital. Reid v Covert, 354 US 1, 1 L ed 2d 1148, 77 S Ct 1222 (1957).

Appellate defense counsel and the Government present substantially the same arguments that were urged before the United States Supreme Court in the Reid v Covert case. We have gone over much the same ground in other cases before us. See United States v Burney, 6 USCMA 776, 21 CMR 98; United States v Wilson, 9 USCMA 60, 25 CMR 322. All that remains is to determine whether dependents of military personnel in foreign lands, who are associated with the military in every way but for the performance of military duties, can constitutionally be considered by Congress as part of the armed forces for the purpose of regulating their conduct on the same basis as those in uniform. In our opinion, Congress has that power.

We answer the certified question in the affirmative, and affirm the decision of the board of review.

Judge FERGUSON concurs.

Judge LATIMER's action will come later.

[fol. 61] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA

HABEAS CORPUS
No. 2145

UNITED STATES OF AMERICA on the relation of
ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

ORDER ISSUING WRIT OF HABEAS CORPUS—September 5, 1958

This 12th day of August, 1958, came Alberta Singleton (United States of America ex. rel.) by Paul M. Friedberg, her attorney, and tendered and asked leave to file her petition for Writ of Habeas Corpus herein, which Petition is ORDERED filed.

The Court, having considered the allegations of said Petition and having heard the argument of counsel thereon, it is ORDERED that a writ of habeas corpus be and the same is hereby granted and issued, directed to Nina Kinsella, Warden of the Federal Reformatory for Women, Alderson, West Virginia, commanding her to produce the body of Mrs. Joanna S. Dial before this Court for a hearing on said Petition at Charleston, West Virginia, on the 5th day of September, 1958, at 10:00 A.M., Eastern Standard Time.

Enter:

/s/ Ben Moore
United States District Judge

[fol. 62] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT

Habeas Corpus No. 2145

UNITED STATES OF AMERICA, on the relation of ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia

Paul M. Friedberg, Charleston, West Virginia, for relator.

Duncan W. Daugherty, United States Attorney, Huntington, West Virginia, Percy H. Brown, Assistant United States Attorney, Hinton, West Virginia, Lt. Col. Peter S. Wondolowski, Judge Advocate General's Corps, United States Army, for respondent.

MOORE, Chief Judge.

OPINION—September 6, 1958

More than a year ago, the Supreme Court of the United States, on a rehearing, decided in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger*, 354 U.S. 1, 77 Sup. Ct. 1222 (1957), that civilian dependents of members of the armed forces overseas in time of peace could not be tried by court-martial for capital offenses. Since that time, considering itself bound by that decision, this court granted a writ of habeas corpus in a case involving a trial by court-martial of such a civilian dependent for the unpremeditated murder of her husband, a non-capital offense. *United States ex rel. Smith* v. *Kinsella* (D.C. S.D. W.Va. No. 1963, unreported). Now petitioner asks the court to grant a writ of habeas corpus to free one Joanna S. Dial, convicted by court-martial of the non-capital offense of involuntary manslaughter of her one-year old son. She was a civilian dependent of her husband, a member of the armed forces overseas. The offense was committed in Germany.

Counsel for respondent stated at the hearing that the case of *Smith* v. *Kinsella, supra*, was not appealed because [fol. 63] of a decision by army authorities that the distinction between it and the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* was not plain enough on which to seek clarification of the last mentioned decision. He, however, argued that this court should not grant the writ in this case for the following reasons:

(1) Only four of the Justices of the Supreme Court who participated in the decision in *Reid* v. *Covert* and *Kinsella* v. *Krueger* held that *no* offense committed by civilian dependents of members of the armed forces overseas in time of peace may be tried by court-martial, whereas two of the other Justices limited their decision in this respect to capital offenses.

(2) That since the Supreme Court decision and since the decision of this court in the case of *Smith* v. *Kinsella, supra*, two district courts, in cases involving civilians employed by the armed forces overseas, who were charged with and convicted of offenses less than capital offenses, have distinguished these cases and have discharged the writs. *United States ex rel. Guagliardo* v. *McElroy*, 158 F. Supp. 171 (D.C. Dist. of Col. 1958); *Grisham* v. *Taylor*, 161 F. Supp. 112 (M.D. Pa. 1958). These two cases are said to be pending upon appeal in their respective circuits.

(3) That the United States Court of Military Appeals, in the very case now under consideration, decided on August 26, 1958, that the court-martial had constitutional power to try Joanna S. Dial as a civilian dependent accompanying the army in West Germany.

It is, of course, known that the opinion of this court prior to the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* was that Congress had power under Article 1, Section 8 of the Constitution of the United States to include civilian dependents accompanying the armed forces overseas as subjects of [fol. 64] the Uniform Code of Military Justice, and therefore properly triable by court-martial for infractions of that Code. In fact, one of those cases, *Kinsella* v. *Krueger* was appealed from a decision of this court.

In the majority opinion of Mr. Justice Black reversing the case from this court and affirming the case of *Reid* v. *Covert*, he began by saying, "These cases . . . involve the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States. . . ."

Had I regarded the offense committed by Mrs. Dorothy Krueger Smith as an offense against the United States (outside the Uniform Code of Military Justice) I would have been inclined to award her the writ here. However, it was and is my opinion that the only basis for defining murder by a civilian in Japan, Germany, or any other foreign sovereignty as a crime against the United States is that it is made so by the Uniform Code of Military Justice. If this be correct, then obviously, unless the inclusion of such civilian dependents as subjects of the Uniform Code of Military Justice be a constitutional exercise of Congressional power, such a crime committed in a foreign country is not a crime against the United States, but a crime against the foreign country where it may be committed.

However, the concurrence of six Justices of the Supreme Court in the affirmance of *Reid* v. *Covert* and the reversal of the companion case of *Krueger* v. *Kinsella*, (styled *Kinsella* v. *Krueger* in the Supreme Court), indicates to me that these Justices all regarded crimes such as those I have mentioned as crimes against the United States. I can conceive of no other reason why they would have concluded that the persons accused in those cases had the constitutional right to be tried in the civil courts of the United States. I believe that I am bound by that decision, much as I may disagree with it.

[fol. 65] Moreover, I can think of no logical distinction, insofar as the constitutional power of Congress is concerned, between its asserted power, denied by the Supreme Court, to subject dependents of members of the armed forces overseas to the jurisdiction of courts-martial for capital offenses, and the like questioned power in cases of non-capital offenses. Of course, where matters of life or death are involved, the facts must be scrutinized closely and the decision carefully weighed; but when ar-

rived at, the applicable principle applies alike in all similar cases.

Believing myself bound by the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger*, I will grant the writ prayed for and discharge Joanna S. Dial from custody.

/s/ Ben Moore
United States District Judge

September 6, 1958.

[fol. 66] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Charleston 29, West Virginia

Chambers of
BEN MOORE, District Judge

September 6, 1958

Hon. Percy H. Brown,
Assistant United States Attorney,
Charleston, West Virginia

Paul M. Friedberg, Esq.,
Attorney at Law,
Security Building
Charleston, West Virginia

Honorable Duncan W. Daugherty,
United States Attorney,
Huntington, West Virginia

In re: United States of America, on the relation of Alberta Singleton v. Nina Kinsella, Warden. Habeas Corpus No. 2145.

Gentlemen:

After carefully considering the argument of counsel and the brief of respondent, I have reached the same conclusion in the above case as in that of *Louise Smith* v. *Kinsella* decided one year ago in which the writ was granted.

I am of opinion that the principle announced in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* is controlling here. Therefore, I will award the writ.

Yours truly,

/s/ Ben Moore
United States District Judge

[fol. 67] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT

HABEAS CORPUS

No. 2145

UNITED STATES OF AMERICA on the relation of
ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

ORDER DISCHARGING PETITIONER FROM CUSTODY—
Entered September 8, 1958

This matter having been regularly brought on the 5th day of September, 1958, for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court ordered that the said Mrs. Joanna S. Dial in whose behalf the Writ of Habeas Corpus was sued out, is illegally restrained of her liberty, as alleged in the petition herein, and that she be and she is hereby discharged from the custody of Nina Kinsella, Warden of the Federal Reformatory for Women, at Alderson, West Virginia, from whom she has been produced.

Enter:

/s/ Ben Moore
United States District Judge

[fol. 68] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

HABEAS CORPUS NO. 2145

UNITED STATES EX REL ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, Warden, Federal Reformatory for Women, Alderson, West Virginia, RESPONDENT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 8, 1958

I

NOTICE is hereby given that Nina Kinsella, Warden, Federal Reformatory for Women, Alderson, West Virginia, the respondent above named, hereby appeals to the Supreme Court of the United States from the order entered on September 8, 1958, in the above-numbered habeas corpus proceeding, releasing Joanna S. Dial from the custody of respondent, who held the said Joanna S. Dial pursuant to a sentence imposed by a general court martial for violation of Article 119 of the Uniform Code of Military Justice (10 U.S.C. 919 Supp. V) (Manslaughter).

The appeal is taken pursuant to 28 U.S.C. 1252.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of docket entries.
2. The petition for writ of habeas corpus.
3. Return and answer.
4. Memoranda of points and authorities in support of return and answer.

[fol. 69] 5. Exhibit A, General court martial orders Nos. 35, 34, 129.

6. Exhibit B, Board of Review decision.
7. Exhibit C, Pleadings and briefs, orders, Certificate of Review by Judge Advocate General.
8. Exhibit D, Record of court martial trial.
9. Exhibit E, Decision of the United States Court of Military Appeals.
10. Order dated August 12, 1958, issuing the writ of habeas corpus.
11. Opinion of the court dated September 6, 1958.
12. Order of the Court discharging petitioner from custody, dated September 8, 1958.
13. This notice of appeal.

III

The following question is presented by this appeal.

Whether Article 2 (11) of the Uniform Code of Military Justice (10 U.S.C. 802 Supp. V) providing for court martial jurisdiction of persons accompanying the Armed Forces overseas is constitutional when applied to a serviceman's civilian dependent wife who was convicted by a general court martial for a non-capital offense.

s/ Duncan W. Daugherty
United States Attorney, Southern District of West Virginia

Attorney for Nina Kinsella, Warden, Federal Reformatory for Women, Alderson, West Virginia, APPELLANT

ADDRESS: Post Office Building
Huntington, West Virginia

[fol. 70] PROOF OF SERVICE

(Omitted in printing)

[fols. 71-73] • • •

[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 75] SUPREME COURT OF THE UNITED STATES

No. 571, October Term, 1958

KINSELLA, Warden, APPELLANT

v.

UNITED STATES EX REL. SINGLETON

APPEAL from the United States District Court for the Southern District of West Virginia.

ORDER NOTING PROBABLE JURISDICTION—February 24, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary calendar and set for argument immediately following No. 570.

February 24, 1959

on October 8, 1958. The time to docket the record has been extended to and including December 19, 1958. The jurisdiction of this Court to review on direct appeal the decision of the District Court discharging Mrs. Dial from custody on the ground that the Act of Congress under which she was being held in confinement upon conviction by court-martial is unconstitutional is conferred by 28 U. S. C. 1252.

STATUTE INVOLVED

Article 2 of the Uniform Code of Military Justice, 10 U. S. C. (Supp. V) 802, 64 Stat. 109, as codified, 70A Stat. 37, provides in pertinent part:

> *Art.* 2. *Persons subject to this Chapter.*
>
> The following persons are subject to this chapter: * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

QUESTION PRESENTED

Whether Article 2 (11) of the Uniform Code of Military Justice providing for court-martial jurisdiction of persons accompanying the armed forces overseas is constitutional when applied to the case of a soldier's spouse who accompanied her husband to Germany and who was convicted by court-martial of the noncapital offense of manslaughter.

STATEMENT

Mrs. Dial, the prisoner, is the wife of a soldier, Specialist Second Class James W. Dial, who accompanied her husband overseas to his military station in Germany. She had traveled to Germany at Government expense and lived with her husband at public quarters on the military base.

In June 1957, after investigation, Mrs. Dial and her husband were charged with involuntary manslaughter arising out of the death of their one-year old infant son because of severe beatings administered by the parents. The offense charged was a violation of Article 119 of the Uniform Code of Military Justice, a non-capital offense, 10 U. S. C. (Supp. V) 919. Both Mrs. Dial and her husband entered pleas of guilty to the offense charged and each was sentenced to confinement for a term of three years. Military appellate review under the Uniform Code has been completed in each case. The sentence of the husband was ordered into execution and he is now serving his confinement at the Branch United States Disciplinary Barracks at Lompoc, California. Mrs. Dial's conviction and sentence were affirmed by the United States Court of Military Appeals on August 26, 1958.

On August 12, 1958, while Mrs. Dial was serving her sentence of confinement at the Federal Reformatory for Women, Alderson, West Virginia, a petition for a writ of habeas corpus was filed on her behalf in the court below. Upon consideration of the petition, the return and answer of appellant, and after

hearing, the District Court entered an order granting the writ of habeas corpus, on September 8, 1958. The court ruled that "Believing myself bound by the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* [354 U. S. 1], I will grant the writ prayed for and discharge Joanna S. Dial from custody." See Appendix, *infra*, p. 13.

THE QUESTION IS SUBSTANTIAL

The District Court has invalidated an Act of Congress—Article 2 (11) of the Uniform Code of Military Justice—insofar as it applies to a military dependent overseas who is charged with, and tried by court-martial for, a non-capital offense. This issue was not decided by the Court in *Reid* v. *Covert*, 354 U. S. 1, but was expressly left open. It is a substantial question which warrants resolution by this Court.

1. In granting the petition for writ of habeas corpus filed on Mrs. Dial's behalf, the District Court held itself bound by the decision in *Reid* v. *Covert*, 354 U. S. 1. The District Court could find "no logical distinction" between capital and non-capital offenses committed by dependents of members of the armed forces serving overseas insofar as their amenability to military jurisdiction is concerned.

However, in *Covert* and *Krueger*, the dependent spouses were both charged with the commission of premeditated murder—a capital crime. That the capital nature of the offense was critical to the Court's decision is shown by the concurring opinion of Mr. Justice Frankfurter who stated (354 U. S at 45): "The Court has not before it, and therefore I need not

intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents. Nor do we have before us a case involving a non-capital crime." Mr. Justice Frankfurter also said (354 U. S. at 45):

> These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.

Mr. Justice Harlan, too, concurred in the result only "on the narrow ground that where the offense is capital, Article 2 (11) cannot constitutionally be applied to the trial of civilian dependents" (354 U. S. at 65), and he also stated that "except for capital offenses * * * I am by no means ready to say that Congress' power to provide for trial by court-martial of civilian dependents overseas is limited by Article III and the Fifth and Sixth Amendments" (354 U. S. at 76).

It seems clear, therefore, that the majority of the Court has not passed on the issue of the validity of Article 2 (11) as applied to dependents in non-capital cases. We are not asking the Court to reconsider its recent decision in *Covert;* what we ask is that the *Covert* ruling be not extended beyond capital offenses.

2. The object of Article 2 (11) was to insure a uniform system of justice, not only among the uniformed personnel of the armed forces, but also among such other persons and personnel whose connection

with the armed forces overseas was so inextricable as to constitute all of them an integral part of the military community overseas. This case typifies the legislative purpose: Mrs. Dial and her husband were charged with the commission of the same offense, the noncapital offense of manslaughter in violation of the Uniform Code, punishable by confinement for three years. Court-martial jurisdiction over the soldier-husband existed by virtue of Article 2 (1) of the Code; unless court-martial jurisdiction over the wife could be exercised under section 11 of the same article, a grave disparity in procedure—and substance—would exist.

In the many military installations which the armed services are forced to maintain overseas because of present world conditions, the dependents of soldiers, sailors, and airmen who accompany their husbands constitute an important factor. They are permitted to accompany their husbands at military expense because it is recognized that they form an essential facet of the military organization. They are there for the purpose of maintaining morale, which in turn helps to maintain an effective military organization. If the armed forces are considered to be one unified organization under the commander of the installation, as they must be, then the dependents who accompany the troops are a part of the same unity. They are considered by the American contingent as well as by the local governments and populations as a part of the visiting American forces. Thus, they have a status which is different from that of the non-military American civilian who lives or

travels abroad. They are members of the American military contingent or force and have rights to quarters provided by our Government, to the use of military post exchanges and schools, to exemption from local taxation, etc.—rights which are afforded them because of their intimate contact with the military.

The commanders of the military installations have full responsibility over all persons under their commands. In many instances all persons attached to the American military contingent are free from custom duties and the immigration processes which are ordinarily imposed by local authorities. In this respect the foreign governments have surrendered or waived their sovereign rights over these dependents because of our assumption of responsibility. Concomitantly with our responsibility there must be normal power to maintain law and order.

If permitted to stand, the serious impact of the lower court's ruling on the morale and discipline of the armed forces is apparent. Mrs. Dial and her husband committed a common offense, were charged with a common crime, and in a common trial both pleaded guilty. They received identical sentences. The husband because he wore a uniform must serve and is serving his sentence. The wife, because she did not wear a uniform, is freed from punishment. Under the ruling below, wives and other dependents cannot be tried by court-martial for any offenses they may commit, with the result that a substantial part of the military contingent is freed from effective justice.

3. Because the decision of this Court in the *Covert*